BEFORE THE CHANCERY COURT FOR
DAVIDSON COUNTY, TENNESSEE IN NASHVILLE

LEAGUE OF WOMEN VOTERS OF TENNESSEE; ALLISON CAVOPOL; CAROL COPPINGER, on her own behalf and as next friend of SAMUEL SHIRLEY; REVEREND JERRY CRISP; TOM JOHN, M.D.; TERRELL McDANIEL, Ph.D.; BRIAN PADDOCK; RANDALL RICE; MERYL RICE; and REVEREND JAMES THOMAS, Plaintiffs	)	
vs.	)	No. 13-1365
JULIE MIX McPEAK, Tennessee Commissioner of Commerce and Insurance; TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE; and ROBERT E. COOPER, JR., Tennessee Attorney General And Reporter, Defendants	)	Part IV-

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

Plaintiffs respectfully submit this memorandum in support of their Motion for a Temporary Restraining Order and Temporary Injunction enjoining the defendants from enforcing the Emergency Rules regulating the conduct of navigators, certified applications counselors, and a host of other private individuals and organizations whose activities "facilitate[] enrollment of individuals or employers in health plans or public insurance plans" offered through the Tennessee Health Insurance Exchange created pursuant to the Patient Protection and Affordable

Care Act. Rule 0780-01-55, Tenn. Admin. Reg. (Sept. 18, 2013)("Emergency Rules"). The statute authorizing the Emergency Rules is invalid, and the Rules were promulgated through defective procedures The Emergency Rules violate Plaintiffs' rights to free speech under the First Amendment to the United States Constitution and Article I, section 19 of the Tennessee Constitution (1) by requiring Plaintiffs to register with the State, including submitting fingerprints and completing a criminal background check, in order to conduct "public education" and to provide information that might "facilitate enrollment of individuals or employers in health plans," and (2) by wholly prohibiting Plaintiffs from even "discuss[ing] the benefits, terms, and features of a particular health plan over any other health plan." Moreover, the Emergency Rules are so vague as to the activities to which they apply that they fail to provide fair notice to the Plaintiffs or standards of enforcement by the Defendants. Thus, the Emergency Rules are void for vagueness.

INTRODUCTION

1. Enrollment Assistance Under the Affordable Care Act

In 2010, Congress enacted the Patient Protection and Affordable Care Act (ACA). Pub. L. No. 111-148, 124 Stat. 119 (2010). The ACA "aims to increase the number of Americans covered by health insurance and decrease the cost of health care." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012). To facilitate its goal of increasing the number of Americans covered by health insurance, beginning on October 1, 2013, eligible individuals, families, and small businesses will be able to enroll in private health insurance through two competitive online exchanges. 42 U.S.C. § 18031(b). (Please see Appendix 1 to the Complaint for a copy of the law.) One of the exchanges is for the sale of individual insurance policies and is known as the Health Insurance Marketplace (Marketplace). The other exchange is for the sale of

group employee health insurance to small businesses and is known as the Small Business Health Options Program, or "SHOP" exchange. *Id.*

The ACA and its implementing regulations create a variety of resources to assist consumers seeking access to health insurance coverage through an Exchange. First, the ACA directs all Exchanges to award grants to entities to act as "Navigators." Entities acting as Navigators are required to (1) conduct public education activities to raise awareness about the Exchange; (2) provide fair, accurate, and impartial information to consumers about health insurance, the Exchange, Qualified Health Plans (QHPs), and insurance affordability programs, including premium tax credits, Medicaid, and the Children's Health Insurance Program (CHIP); (3) facilitate enrollment in QHPs; (4) provide referrals to consumer assistance programs (CAPs) and health insurance ombudsmen for enrollees with grievances, complaints, or questions about their health plan or coverage; and (5) to provide information in a manner that is culturally and linguistically appropriate. 42 U.S.C. § 18031(d)(4)(K) and (i); 45 CFR 155.210 (Federal regulations are compiled in Appendix 2 to the Complaint.). Two organizations received Navigator grants in Tennessee, the Structured Employment Economic Development Corporation (SEEDCO) and the Tennessee Primary Care Association (TPCA). *See* http://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/Downloads/navigator-list-8-15-2013.pdf.

Federal regulations also require each Exchange to establish a "certified application counselor" (CAC) program. 45 C.F.R. § 155.225(a). Unlike Navigators, CACs are not funded through the Exchange. Instead, CACs are staff and volunteers of organizations certified by the Exchange as certified application counselor organizations. 45 C.F.R. § 155.225(b). These organizations may include community health centers, health care providers, social service

organizations, and local government entities, who do not serve as Navigators, but who have a formal relationship with the Exchange. 78 Fed. Reg. at 42825 (July 12, 2013). CACs perform basic application assistance functions, but their duties are limited to (1) providing information to individuals and employees about the full range of QHP options and insurance affordability programs for which they are eligible; (2) assisting individuals and employees to apply for coverage in a QHP through the Exchange and for insurance affordability programs; and (3) helping to facilitate enrollment of eligible individuals in QHPs and insurance affordability programs. 45 C.F.R. § 155.225(c).

Both Navigators and CACs must comply with federal standards governing conflicts of interest, 45 C.F.R. § 155.215(a) and federal standards governing the privacy and security of personally identifiable information. 45 C.F.R. §§ 155.210(b)(2)(iv); 155.225(d)(3). The latter standards prohibit the use or disclosure of personally identifiable information except as necessary to carry out the prescribed functions in the regulations. Improper use and disclosure of information not in accordance with federal standards may subject an individual to civil monetary penalties of $25,000. 45 CFR § 155.260(g). Moreover, both Navigators and CACs must complete HHS-approved training, pass an examination, participate in continuing education, and be recertified on at least an annual basis. 45 CFR § 155.215(b).

2. <u>The Challenged Legislation: Chapter 377 of the Public Acts of 2013</u>

During the 2013 Session of the Tennessee General Assembly, legislation was introduced that was designated as Senate Bill 1145 and House Bill 881 (SB1145/HB881). The caption described the bill as follows:

> AN ACT to amend Tennessee Code Annotated, Title 56, Chapter 6, relative to the regulation of navigators in the implementation of the Patient Protection and Affordable Care Act regarding health insurance exchanges.

As filed, SB1145/HB881 defined "navigator" to mean "a person selected to perform the activities and duties identified in Section 1311(i)[42 U.S.C. § 181031(i)] of the federal ACA." (Please see Appendix 3 to the Complaint.) During the course of the legislative session, SB1145/HB881 was substantially amended, and the definition of "navigator" was revised to include entities and individuals who are not navigators under the ACA. As thus amended, the bill was enacted as Chapter 377 of the Public Acts of 2013, and took effect July 1, 2013. (Please see Appendix 4.)

Chapter 377 now defines "navigator" to include "any person, other than an insurance producer, who:

> (A) Receives any funding, directly or indirectly, from an exchange, this state or the federal government to perform any of the activities and duties identified in 42 U.S.C. § 18031(i);
>
> (B) Facilitates enrollment of individuals or employers in health plans or public insurance programs offered through an exchange;
>
> (C) Conducts public education or consumer assistance activities for, or on behalf of, an exchange; or
>
> (D) Is described or designated by an exchange, this state or the United States department of health and human services, or could reasonably be described as, a navigator, an in-person assister, enrollment assister, application assister or application counselor.

Tenn. Code Ann. 56-6-1201(3). The Chapter gives the commissioner of commerce and insurance authority to "promulgate rules and regulations as may be necessary or appropriate to regulate the activities of navigators as may be consistent with the Patient Protection and Affordable Care Act." Tenn. Code Ann. 56-6-1204.

3. The Challenged Emergency Rules: Chapter 0780-01-55

On September 18, 2013, the Commissioner of the Department of Commerce and Insurance ("Commissioner") promulgated Emergency Rules under the purported authority of

T.C.A. § 4-5-208 and Chapter 377. (Please see Appendix 5 to the Complaint.) The Emergency Rules took effect the same day and are to remain in effect for 180 days, until March 17, 2014. Chapter 0780-01-55, Tenn. Admin. Reg. (Sept. 2013). The Emergency Rules create a new regulatory chapter, Chapter 0780-01-55.

A. Individuals and Organizations Regulated by the Emergency Rules

The Emergency Rules define a "navigator" not just as someone selected to perform the activities and duties identified in Section 1311(i) of the ACA, but as "any individual or entity, other than an insurance producer, who:

> (a) Receives any funding, directly or indirectly, from an exchange, this state or the federal government to perform any of the activities and duties identified in 42 U.S.C. § 18031(i);
>
> (b) Facilitates enrollment of individuals or employers in health plans or public insurance programs offered through an exchange;
>
> (c) Conducts public education or consumer assistance activities for, or on behalf of, an exchange; or
>
> (d) Is described or designated by an exchange, this state or the United States Department of Health and Human Services, or could reasonably be described as, navigators, "*non-navigator assistance personnel*" or in-person assistance personnel," enrollment assisters, application assisters or application counselors including certified application counselors.

Rule 0780-01-55-.02(6) (emphasis added to -.02(6)(d)). The Emergency Rules thus track the definition in Chapter 377, with the important addition of the phrase "non-navigator assistance personnel."

The Emergency Rules definition of "navigator" includes "certified application counselors," who are further defined as "any employee of volunteer of a certified application counselor organization that enters into an agreement with the exchange to have its employees or volunteers:

(a) Provide information to individuals and employees about the full range of qualified health plan options and insurance affordability programs for which they are eligible;

(b) Assist individuals and employees to apply for coverage in a qualified health plan through the exchange and for insurance affordability programs; and

(c) Help facilitate enrollment of eligible individuals in qualified health plans and insurance affordability programs.

Rule 0780-01-55-.02(3). The Emergency Rules define a "certified application counselor organization" as

> [A]ny organization, including an organization designated as a Medicaid certified application counselor organization by a state Medicaid or CHIP agency, designated by the exchange to certify its staff members or volunteers to act as certified application counselors, and includes those organizations described in 45 CFR § 155.225.

Rule 0780-01-55-.02(4).

B. Requirements and Prohibitions Established by the Emergency Rules

The Emergency Rules require any person or entity that takes any action that would bring it within the expansive definitions quoted to register with the Commissioner and, among other things, "submit a full set of fingerprints and successfully complete[] a criminal background check in a manner prescribed by the commissioner." Rule 0780-01-55-.03(1) and -.04(f). Registration expires after twelve months, at which point any navigator, business entity navigator, certified application counselor or certified application counselor must file an application for renewal of the registration. Rule 0780-01-55-.05(1) and -05(2). For registration to be renewed, an individual navigator or certified application counselor must complete twelve hours of continuing education. Rule 0780-01-55-.05(3).

The Emergency Rules prohibit navigators and certified application counselors from, among other things,

> (b) Discuss[ing] the benefits, terms, and features of a particular health plan over any other health plans and offer[ing] advice about which plan is better or worse or suitable for a particular individual or employer;
>
> (c) Recommend[ing] or endors[ing] a particular health plan or advis[ing] consumers about which health plan to choose; or
>
> (d) Provid[ing] any information or services related to health benefit plans or other such products not offered in the exchange . . . .

Rule 0780-01-55-.06.

C. Penalties Imposed by the Emergency Rules

The Emergency Rules provide that the Commissioner may "levy a fine not to exceed One Thousand dollars ($1000)" for any violation of the Rules. Rule 0780-01-55-.07(1). The Emergency Rules also allow the Commissioner to

> examine and investigate the business affairs and records of any registrant, or any person required to be registered, to determine whether the individual or entity has engaged or is engaging in any violation of this chapter or applicable insurance law.

Rule 0780-01-55-.07(4).

ARGUMENT

1. Temporary Injunction Standard

Rule 65.04(2) of the Tennessee Rules of Civil Procedure provides that a court may grant a temporary injunction during the pendency of an action:

> if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual."

Tenn. R. Civ. P. 65.04(2). Courts generally must consider the following factors when deciding whether to grant a preliminary injunction:

> (1) the threat of irreparable harm to the plaintiff if the injunction is not granted;
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> (2) the balance between this harm and the injury that granting the injunction would inflict on defendant;
>
> (3) the probability that plaintiff will succeed on the merits; and
>
> (4) the public interest.

Moody v. Hutchison, 247 S.W.3d 187, 199-200 (Tenn. Ct. App. 2007).

2. Plaintiffs Will Be Irreparably Harmed if the Injunction is Not Granted

On their face, the Emergency Rules enact content-based restrictions on Plaintiffs' speech. The Emergency Rules require anyone whose speech "facilitates enrollment of individuals or employers in health plans" or who "conducts public education" to register with the Commissioner. Rule 0780-01-55-.02(6) and .03. The Emergency Rules also directly prohibit Plaintiffs from "discuss[ing] the benefits, terms, and features of a particular health plan over any other health plan," from "recommend[ing] or endors[ing] a particular health plan," and from "advising consumers about which health plan to choose." Rule 0780-01-55-.06(1). As explained in Section IV.a., *infra*, these restrictions on Plaintiffs' speech violate Plaintiffs' rights to free speech under the First Amendment to the U.S. Constitution and Article I, section 19 of the Tennessee Constitution.

As the U.S. Supreme Court has held, "[l]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") Thus, if this Court

finds that Plaintiffs have a substantial likelihood of success on the merits of their First Amendment claims, Plaintiffs will also have established that they will face irreparable harm if the injunction is not granted. *See Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007)(holding that, in cases with First Amendment implications, the "likelihood of success on the merits" factor is often determinative because "issues of the public interest and harm to the respective parties largely depend on the constitutionality" of the challenged enactment.); *Dayton Area Visually Impaired Persons v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995("[T]o the extent that the plaintiffs have established a substantial likelihood that they could succeed on the merits of their First Amendment claims, they have also established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights.").

3. The Harm to the Plaintiffs Outweighs Any Injury that Granting the Injunction Would Cause the State

As with the irreparable harm analysis, the balancing of harm analysis requires a consideration of the merits, since the harm to a party resulting from imposition of an injunction is related to whether the conduct subject to the injunction is unconstitutional. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). If Plaintiffs demonstrate that they have a substantial likelihood of success on the merits of their First Amendment claims, then the immediate and irreparable harm to Plaintiffs' constitutional rights would clearly outweigh any harm to the Defendants, which in any case would be entirely speculative.[1]

[1] There is no financial harm to the State if the Court restrains and temporarily enjoins enforcement of Chapter 377 and the Emergency Rules. The statute's fiscal note is posted at http://www.capitol.tn.gov/Bills/108/Fiscal/SB1145.pdf, , and a copy is attached to this memorandum for the Court's reference. The fiscal note anticipated that the cost of administering the registration process would be $64,800 in the current fiscal year. That was to be offset by revenues from charging a $60 registration fee. Chapter 377 did not authorize the collection of a fee, however, and neither do the Emergency Rules. Hence implementation of the Rules requires DCI to incur an expense but generates no revenues. Restraining the Rules' enforcement neither increase the Defendants' expenses nor reduce its revenues.

4. Plaintiffs Have a Significant Likelihood of Success on the Merits

A. The Emergency Rules Violate Plaintiffs' Right to Free Speech

The Free Speech Clause of the First Amendment, made applicable to states through the Fourteenth Amendment, *Fiske v. Kansas*, 274 U.S. 380 (1927), provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const., Amend. I. Similarly, Article I, Section 19 of the Tennessee Constitution provides that "[t]he free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Tenn. Const., Art. I, Sec. 19. Article 1, section 19 provides protection of free speech rights "at least as broad" as the First Amendment. *Leech v. Am. Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 745 (Tenn. 1979).

The Emergency Rules prohibit anyone covered by the Rules from:

- Discuss[ing] the benefits, terms, and features of a particular health plan over any other health plan;
- [O]ffer[ing] advice about which health plan is better or worse or suitable for a particular individual or employer;
- Recommend[ing] or endors[ing] a particular health plan; and,
- [A]dvis[ing] consumers about which health plan to choose.

Rule 0780-01-55-.06(1)(b) and (c). The Emergency Rules also require individuals to register with the Commissioner before engaging in any speech which "facilitates enrollment of individuals or employers in health plans or public insurance programs" or "conducting public education or consumer assistance activities." Rule 0780-01-55-.02(6)(b) and (c). Thus, the Emergency Rules clearly restrict speech and thus implicate the First Amendment and Article I, Section 19.

The fact that the Emergency Rules do not outright prohibit certain speech, but instead require individuals who wish to engage in such speech to register with the Commissioner, does not change the analysis. The U.S. Supreme Court has repeatedly reaffirmed that prior registration requirements are troubling in the free speech context. In *Thomas* v. *Collins*, 323 U.S. 516 (1945), for instance, the Supreme Court held that a state statute requiring a labor union organizer to obtain an organizer's card was incompatible with the free speech and free assembly mandates of the First and Fourteenth Amendments. The statute demanded nothing more than that the labor union organizer register, stating his name, his union affiliations and describing his credentials. This information having been filed, the issuance of the organizer's card was subject to no further conditions. The State's obvious interest in acquiring this pertinent information was felt not to constitute an exceptional circumstance to justify the restraint imposed by the statute. *Id.* at 539-40; *see also Hynes v. Mayor & Council of Oradell*, 425 U.S. 610 (municipal ordinance requiring individuals who wished to canvass or solicit to notify the police department in advance "chill discussion itself" and raise "substantial First Amendment questions"); *.N.A.A.C.P., Western Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984) ("The simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with applicable regulations inhibits speech.") Thus, both the outright prohibitions on speech and the registration requirements implicate the First Amendment.

When a governmental regulation is challenged under the First Amendment, the applicable standard of review depends on a number of factors. The most important factor is whether the regulation is content-based or content-neutral. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228-30 (1987). A regulation is content-based if a determination of what speech is subject to the regulation "cannot be made without reference to the content of the speech." *Doe v.*

Doe, 127 S.W.3d 728, 732 (Tenn. 2004); *see also Gresham v. Peterson*, 225 F.3d 899, 905 (7th Cir. 2000)("If it is necessary to look at the content of the speech in question to determine whether the speaker violated the regulation, then the regulation is content-based."). The Emergency Rules prohibit speech pertaining to specific topics related to the enrollment in health plans or public insurance programs. Thus, they are clearly content-based restrictions.

Content-based regulations are presumptively invalid under the First Amendment and subject to strict scrutiny.[2] *Doe*, 127 S.W.3d at 732 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)); *United States v. Playboy Entm't Group*, 529 U.S. 803, 818 (2000)("It is rare that a regulation restricting speech because of its content will ever be permissible."). Under strict scrutiny, the defendants have the burden of showing (1) that the Emergency rules are "necessary to serve a compelling state interest," and (2) that they are "narrowly drawn to achieve that end." *Doe*, 127 S.W.3d at 732. . "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

Defendants cannot meet this high burden. The stated purpose of the Emergency Rules is to "ensure that individuals who are not of good moral character cannot act as navigators in this State" and "to keep convicted felons from gaining access to Tennessee citizen's financial

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[2] Courts apply an intermediate scrutiny test to content-based restrictions on "commercial speech." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 570-71 (1980). Commercial speech is "expression related *solely* to the economic interests of the speaker and his or her audience." *Bellsouth Adver. & Publ. Corp. v. Tenn. Regulatory Auth.*, 79 S.W.3d 506, 518 (Tenn. 2002)(emphasis added); *see also Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (defining commercial speech as "speech that does no more than propose a commercial transaction."). Advertising is the classic form of commercial speech. Unlike advertising, the speech restricted by the Emergency Rules has nothing to do with the economic interests of the Plaintiffs and does not propose a commercial transaction between the Plaintiffs and any potential audience. *see* 45 C.F.R. §§155.205(d)-(e) and 155.225(g) and 78 Fed. Register 42,829 (July 17, 2013 ("HHS does not believe that it would be consistent with the purpose of the Navigator program or the consumer assistance, education, and outreach functions under § 155.205(d) and (e) for Navigators or non-Navigator assistance personnel to charge consumers for their services") Thus, the commercial speech doctrine does not apply.

information and to ensure that navigators are not acting as insurance producers." Emergency Rules, Statement of Necessity. Defendants do have a legitimate interest in protecting Tennessee citizen's financial information and ensuring that navigators are not acting as insurance producers. The Emergency Rules, however, regulate individuals and entities based on speech, not on whether they receive financial information from Tennessee citizens. They regulate individuals whose speech "facilitates enrollment," who "conduct[] public education," who "discuss," "recommend," "endorse," and "advise." The Emergency Rules say *nothing* about the receipt of financial information by the individuals and entities it regulates.

Indeed, most of the conduct regulated by the Emergency Rules does not even raise the possibility of the misuse of citizens' financial information. For example, DCI released a Frequently Asked Questions on September 20, 2013 (FAQ #1) purporting to explain the restriction on "public education" in the Emergency Rules. (Please see Appendix 1 to the Complaint.) FAQ #1 gives the following example of the distinction between conduct that would require registration with the Commissioner and conduct that would not require registration:

> if an organization conducts a presentation in which a room full of people is shown the federally facilitated marketplace website and the presenter walks the class through a dummy application process, so long as the people in the room do not have an opportunity to sign up during the presentation, this educational presentation would not be considered acting as a navigator or application counselor under our rule and would not require registration. However, if the people in that room are sitting in front of computers and are *filling out their own federally facilitated marketplace applications during the presentation*, then this would be considered facilitating enrollment in the marketplace and the presenter would have to be certified as an application counselor or a navigator by the federal government and be registered with the Tennessee Department of Commerce and Insurance.

FAQ # 1 (emphasis added). In neither of these scenarios would the speaker have access to anyone's financial information. Thus, in this example, the Emergency Rules restrict protected

speech while doing nothing to advance the Defendants' interest in protecting Tennessee citizens' financial information.

Moreover, even if the Emergency Rules would in limited instances further the Defendants' legitimate interests, the Rules are vastly overbroad. "A law is overbroad under the First Amendment if it 'reaches a substantial number of impermissible applications' relative to the law's legitimate sweep." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377, 387 (6th Cir. 2001) (citations omitted). Overbroad laws warrant invalidation "to prevent the chilling of future protected expression," and thus, "any law imposing restrictions so broad that it chills speech outside the purview of its legitimate regulatory purpose will be struck down." *Id.* As the U.S. Supreme Court has noted, "[o]verbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces . . . social costs caused by the withholding of protected speech." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

The Emergency Rules' definition of "navigator" is unconstitutionally overbroad. The Rules define a navigator to include "any individual or entity, other than an insurance producer, who:

> . . .
>
> (a) Facilitates enrollment of individuals or employers in health plans or public insurance programs offered through an exchange;
>
> (b) Conducts public education or consumer assistance activities for, or on behalf of, an exchange; or
>
> (c) Is described or designated by an exchange, this state or the United States Department of Health and Human Services, or could reasonably be described as, navigators, "non-navigator assistance personnel" or in-person assistance personnel," enrollment assisters, application assisters or application counselors including certified application counselors.

Rule 0780-01-55-.02(6). As exemplified by the named plaintiffs' circumstances, set forth in the verified complaint, the Emergency Rules' broad definition would capture a vast array of constitutionally protected speech, including:

- family members assisting their loved ones enroll in health plans or public insurance programs offered through an exchange;
- ministers assisting their congregants;
- charities providing information and referral services;
- lawyers or accountants advising their clients; or,
- medical providers assisting their patients.

Because the Emergency Rules require such individuals to register with the Commissioner before engaging in these types of constitutionally-protected activities, they are clearly overbroad.

B. The Emergency Rules are Void for Vagueness

The Fourteenth Amendment to the United States Constitution prohibits states from "depriving any person of life, liberty, or property, without due process of law." U.S. Const. amend. 14. Article I, section 8 of the Tennessee Constitution provides an identical protection; as the Tennessee Supreme Court has observed, "the 'law of the land' proviso of our constitution is synonymous with the 'due process of law' provisions of the federal constitution." *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 786 (Tenn. 1980) (citing *Daugherty v. State*, 216 Tenn. 666, 393 S.W.2d 739 (Tenn. 1965)).

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545 (6th Cir. 2007), the federal Court of Appeals for the Sixth Circuit said:

> We have recognized that the vagueness doctrine has two primary goals: (1) to ensure fair notice to the citizenry and (2) to provide standards for enforcement [by officials]. With respect to the first goal, the Supreme Court has stated that "[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1925). With respect to the second goal, the Supreme Court stated that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to [officials] for resolution on an ad hoc and subjective basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

502 F.3d at 551.

The Emergency Rules fail to meet either goal of the void for vagueness doctrine. The Emergency Rules require registration with the Commissioner before engaging in any activity that "facilitates enrollment of individuals or employers in health plans or public insurance programs offered through an exchange." Rule 0780-01-55-.02(6)(b). Mirriam-Webster's Collegiate Dictionary defines "facilitate" as "to make easier; to help bring about." Mirriam-Webster's Collegiate Dictionary (10th ed. 1998). Given the very broad meaning of "facilitate," individuals "must necessarily guess" at the speech or conduct that would require them to register with the Commissioner. Would a person "facilitate enrollment" by telling an individual that the website for enrolling in health plans offered through an exchange is www.healthcare.gov?Would driving an individual to a public library to use a computer to enroll in a health plan "facilitate enrollment"? Would helping a blind individual complete an online application for a health plan "facilitate enrollment"? Using the natural and ordinary meaning of the word "facilitate," all of these activities appear to require registration with the Commissioner. The vagueness as to what conduct is permissible without registration will inevitably lead citizens to avoid engaging in lawful conduct for fear of facing a $1,000 penalty. Moreover, given the broad range of conduct

that could be characterized as "facilitating enrollment," the Emergency Rules fail to provide any standard of enforcement by the Commissioner. Thus, the Rules are unconstitutionally vague.

The vagueness of the Emergency Rules is particularly troubling because the Rules threaten Plaintiffs' First Amendment right to free speech. The Supreme Court has held that the principle of clarity is especially demanding when First Amendment freedoms are at risk. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); *City of Knoxville v. Entm't Res., LLC*, 166 S.W.3d 650, 655 (2005) ("Where a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts.")(quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974)). Given that simply providing information about the process for enrolling in health plans or public programs offered through the exchange would fall within the plain meaning of "facilitat[ing] enrollment," the Emergency Rules violate Plaintiffs' due process rights by failing to give fair notice of the speech to which they apply.

C. The Emergency Rules are Preempted By Federal Law

Federal law and regulations permit states to regulate navigators and CACs, but only to the extent that state law "does not prevent the application of the provisions of Title I of the Affordable Care Act." 42 U.S.C. § 18031(k); 45 C.F.R. § 155.120. State laws or regulations which conflict with implementation of the ACA, including specifically the consumer assistance provisions of the law, are therefore preempted and are invalid under the Supremacy Clause of the United States Constitution.

The Emergency Rules are preempted by federal law in two ways. First, the Rules prohibit anyone, other than an insurance producer, from discussing the benefits, terms and features of a particular health plan over any other health plans and offering advice about which health plan is better or worse or suitable for a particular individual or employer. Rule 0780-01-550-.06(b). This prohibition directly conflicts with federal regulations that require federally designated navigators and CACs to "provide information to consumers about the full range of [qualified health plan] options and insurance affordability programs for which they are eligible." 45 C.F.R. §§ 155.215(a)(2)(iv) and 155.225(c)(3). CACs are specifically directed by federal regulations to "act in the best interest of the applicants and enrollees assisted," which requires them to provide the sort of advice and assistance that the Emergency Rules prohibit. 45 C.F.R. § 155.255(d)(4). Because Emergency Rule 0780-01-550-.06(b) thus prevents the application of the provisions of Title I of the ACA, that Emergency Rule is preempted by federal law. 42 U.S.C. § 18031(k); 45 C.F.R. § 155.210. Emergency Rule 0780-01-550-.06(1)(b) is therefore invalid under the Supremacy Clause of the United States Constitution.

Second, the Emergency Rules require any person, other than an insurance producer, who wishes to perform the duties of a navigator or certified application counselor to first go through an application process and obtain the approval of the defendant Commissioner. That process was not created until the week before Title I of the ACA is to take effect on October 1, 2013, leaving too little time for most individuals to meet the registration requirements and be able to fulfill their federal duties as of that date. Because the Emergency Rules thus prevent the timely application of the provisions of Title I of the ACA, including the provisions for consumer assistance, the Emergency Rules are preempted by the ACA. 42 U.S.C. § 18031(k); 45 C.F.R. § 155.210. *See Profill Development, Inc. v. Dills,* 960 S.W.2d 17 (Tenn. App. 1997).

In addition, because the Emergency Rules prevent the timely application of the provisions of Title I of the ACA, including the provisions for consumer assistance, the Emergency Rules exceed the regulatory authority granted by Chapter 377. Chapter 377 only authorizes such regulation of navigators "as may be consistent with the Patient Protection and Affordable Care Act." The Emergency Rules are therefore void.

D. The Authorizing Legislation of the Emergency Rules Violates the Caption Provision of Tenn. Const., Art. II, Section 17.

Article II, § 17 of the Tennessee Constitution provides:

> Sec. 17. Origin and frame of bills. - Bills may originate in either House; but may be amended, altered or rejected by the other. No bill shall become a law which embraces more than one subject, that subject to be expressed in the title. All acts which repeal, revive or amend former laws, shall recite in their caption, or otherwise, the title or substance of the law repealed, revived or amended.

The Tennessee Supreme Court has explained that the purpose of Article II, § 17, is to prevent "surprise and fraud" and to inform legislators and the public about the nature and scope of proposed legislation. *Tennessee Mun. League v. Thompson*, 958 S.W.2d 333, 338 (1997). Thus, "if the legislature adopts a restrictive title where a particular part or branch of a subject is carved out and selected, then the body of the act must be confined to the particular portion expressed in the limited title." *Id.* (citing *Memphis St. Ry. Co. v. Byrne,* 104 S.W. 460, 461 (1907)). Any act that does "not express the subject of the act" in the title is unconstitutional and invalid. *Cannon v. Mathes,* 55 Tenn. 504, 518-19 (1872).

There are numerous examples of acts which the Tennessee Supreme Court has declared void due to the restrictive nature of their titles, or captions, and the broad nature of the body of the act. For example, in *Jackson v. Weis & Lesh Mfg. Co.,* 137 S.W. 757 (1911), the Court held that a caption entitled "an act to make it unlawful to employ a child less than twelve years of age in workshops, mines, mills, or factories in this State" was restrictive. The Court held that the

legislation at issue was void under Article II, § 17 because the text of the bill dealt with children 17 years of age and younger and was, therefore, broader than its limited caption. Similarly, in *Armistead v. Karsch,* 237 S.W.2d 960, 962 (1951), the Court held unconstitutional an act which in its body provided benefits to widows of all city employees and to children and mothers under certain circumstances, because the restrictive provision of the caption stated only that the Act was "to provide certain benefits for widows of pensioned employees."

The title, or caption, of Chapter 377, is restrictive. It reads:

> AN ACT to amend Tennessee Code Annotated, Title 56, Chapter 6, relative to the regulation of navigators in the implementation of the Patient Protection and Affordable Care Act regarding health insurance exchanges.

Thus, under Article II, § 17, the body of the act must be confined to the regulation of "navigators" under the ACA. Navigators are specifically defined in the ACA as entities that receive grants from the Exchanges to perform a specific menu of duties. 42 U.S.C. § 18031(i).

As enacted, Chapter 377 authorized the regulation of numerous individuals and organizations that are not "navigators in the implementation of the Patient Protection and Affordable Care Act." Chapter 377 applies to "*any person*, other than an insurance producer, who:

> ...
>
> (B) Facilitates enrollment of individuals or employers in health plans or public insurance programs offered through an exchange;
>
> (C) Conducts public education or consumer assistance activities for, or on behalf of, an exchange; or
>
> (D) Is described or designated by an exchange, this state or the United States department of health and human services, or could reasonably be described as, a navigator, an in-person assister, enrollment assister, application assister or application counselor.

Tenn. Code Ann. 56-6-1201(3)(emphasis added). Because the body of Chapter 377 is broader than its limited caption, it is unconstitutional under Article II, § 17. Therefore, the Emergency Rules are also void due to the failure of their authorizing legislation.

E. The Emergency Rules are Void under T.C.A. §56-1-701.

T.C.A. §56-1-701(a) provides that "[t]he commissioner, whenever promulgating or amending rules and regulations relating to the *business of . . . health insurance*, shall do so only after a hearing . . . of which notice was given as prescribed by law." (emphasis added.) Pursuant to T.C.A. §56-1-701(b), notice must be given at least 30 days in advance of a hearing. The Emergency Rules specify that the activities and duties of navigators and certified application specialists, as defined in Chapter 377 of the Public Acts of 2013 (Chapter 377), "shall be deemed to constitute transacting *the business of insurance*." Rule 0780-01-55-.09((1), Tenn. Admin. Reg. (Sept. 18, 2013) (emphasis added). Accordingly, T.C.A. §56-1-701(b) applies, and before the Commissioner can promulgate any rule regulating individuals or entities described in Chapter 377, he must comply with the requirement that a public hearing be held after at least thirty days' notice.

There is an exception to the notice period prescribed in T.C.A. §56-1-701(b), but that exception does not apply in this instance. Under T.C.A. §56-1-701(b), thirty days' notice must be given unless "a different period of notice is provided by other provisions of the insurance law relative to particularized matters." For example, the Commissioner is authorized, under T.C.A. 56-6-124, to promulgate regulations pursuant to the Uniform Administrative Procedures Act, which would include emergency rule making provisions. *See* T.C.A. 4-5-208. However, Title 56, Chapter 6, Part 1 governs only "the qualifications and procedures for the licensing of insurance producers." In other words, this section of the Tennessee Code governs a

particularized matter – the licensing of insurance producers. Individuals and entities described in Chapter 377 fall outside the scope of this section. Indeed, insurance producers are explicitly excluded from the purview of the Emergency Rules. Therefore, the notice period incorporated in this particularized section about insurance producers does not apply, which renders the emergency rulemaking improper and constitutes a violation of the notice and hearing provisions of T.C.A. §56-1-701(b).

While T.C.A. §56-1-701 creates specific notice requirements for the promulgation of rules and regulations affecting the business of health insurance, T.C.A. §56-1-702 incorporates the Uniform Administrative Procedures Act (UAPA) for purposes of determining the effect and validity of a rule. Under the UAPA, "[a]ny agency rule not adopted in compliance with this chapter shall be void and of no effect and shall not be effective against any person or party nor shall it be invoked by the agency for any purpose." T.C.A. § 4-5-216. Accordingly, the violation of the notice and hearing requirements described in T.C.A. §56-1-701(b) render the Emergency Rules void *ab initio*. *Mandela v. Campbell*, 978 S.W.2d 531, 533 (Tenn. 1998) ("failure to promulgate a rule as contemplated by the UAPA renders the rule void").

Alternatively, even if emergency rulemaking is not explicitly forbidden in the regulation of the business of health insurance, the Commissioner's attempted reliance on T.C.A. §4-5-208 is to no avail, because the Emergency Rules failed to comply with that statute. The Statement of Necessity purports to make findings that emergency rules were warranted because, "the rules are required by an enactment of the general assembly within a prescribed period of time that precludes utilization of rulemaking procedures described elsewhere in T.C.A. Title 4, Chapter 5, for the promulgation of permanent rules." Rule 0780-01-55, Tenn. Admin. Reg. (Sept. 18, 2013); *see also,* T.C.A. 4-5-208(a)(5). However, T.C.A. § 4-5-208(e) explicitly forecloses the use of

emergency rules in situations where the agency has failed to "timely process and file rules through the normal rulemaking process." In other words, emergency rules may be proper when actions taken by the general assembly make adequate notice impossible or impracticable; however, an agency's *own delay* will be insufficient rationale for a finding of emergency. In this instance, the Department of Commerce and Insurance cannot properly rely on T.C.A. § 4-5-208(a)(5) because any delay was a delay of its own creation.

The Statement of Necessity provided on the Emergency Rule Filing Form alleges the following:

> The Act (Chapter 377) became effective on July 1, 2013 and the public chapter was signed into law by the Governor on April [sic] 16, 2013. The exchanges being created under PPACA become operational on October 1, 2013. As such, navigators will begin facilitating enrollment in the exchanges on October 1, 2013 as well. However, the Department of Health and Human Services ("HHS") did not release the final federal navigator rule until July 17, 2013. There is not enough time to go through a notice of rulemaking hearing before the October 1, 2013 operational date of the exchanges.

Rule 0780-01-55, Tenn. Admin. Reg. (Sept. 18, 2013). As this Statement notes, the Act went into effect on July 1, 2013. This afforded the Department ample time – nearly three months – to comply with the 30-day notice period described in T.C.A. §56-1-701(b). Even if, as the Department contends, it could not have put forth proposed rules until after the HHS released its final Navigator rule on July 17, 2013, this still would have afforded the Department more than sufficient time to review the final HHS rule and promulgate regulations that comport with the notice and hearing requirements of T.C.A. §56-1-701 and any other relevant "rulemaking procedures described elsewhere in T.C.A. Title 4, Chapter 5, for the promulgation of permanent rules."

When an agency's reliance on emergency rulemaking is contested, "the burden of persuasion shall be upon the agency to demonstrate that the rule meets the criteria established by

this section." T.C.A. § 4-5-208(d). The facts outlined above demonstrate that the Department of Commerce and Insurance cannot justify the need for emergency rules and therefore cannot meet this burden. Accordingly, the Emergency Rules fail to comply with the requirements of the UAPA. As noted above, "[a]ny agency rule not adopted in compliance with [the UAPA] shall be void and of no effect and shall not be effective against any person or party nor shall it be invoked by the agency for any purpose." T.C.A. § 4-5-216.

F. The Emergency Rules are void as applied to attorneys under the Limitation of Powers provision of Article II, Section 2 of the Tennessee Constitution.

As "the repository of the inherent power of the judiciary in this State," the Tennessee Supreme Court has the "essential and fundamental right to prescribe and administer rules pertaining to the licensing and admission of attorneys." *In re. Burson*, 909 S.W.2d 768, 772-773 (Tenn. 1995). That power necessarily includes the authority to define and regulate the scope of legal practice. 909 S.W.2d at 775-776. The Legislative and Executive Branches can adopt measures, e.g., penalties for the unauthorized practice of law, that are in aid of the Judicial Branch's regulation of the practice of law. But those other branches cannot usurp the Supreme Court's regulatory responsibilities without violating the Limitation of Powers proscription in Article II, Section 2, of the Tennessee Constitution. *Id.*

Chapter 377 and the Emergency Rules clearly trespass on the authority of the Supreme Court. The Emergency Rules provide, without exception or limitation, that the defendant Commissioner:

> may examine and investigate the business affairs and records of any registrant, or any person required to be registered, to determine whether the individual or entity has engaged or is engaging in any violation of this chapter or applicable insurance law.

Rule 0780-01-550-.07(4). This rule arrogates the Supreme Court's power to conduct such investigations of attorneys' business affairs and records, including the examination of confidential attorney work product and privileged client communications, as DCI deems fit.

The Emergency Rules also bar attorneys, just as the Rules bars everyone else who is not an insurance producer, from:

> Discuss[ing] the benefits, terms, and features of a particular health plan over any other health plans and offer[ing] advice about which health plan is better or worse or suitable for a particular individual or employer.

Rule 0780-01-550-.06(1)(b). Attorneys are thus barred from discussing such matters with their clients, or from giving clients the benefit of their legal judgment by advising them on which health plan best serves their individual or business interests. By prohibiting attorneys from fully advising their clients on how important aspects of the complex health law affect the clients or their business affairs, the Emergency Rules impinge upon the very essence of the practice of law, as defined by the Tennessee Supreme Court.

> Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment.

In re. Burson, supra, 909 S.W.2d at 775.

The Emergency Rules' limitations on the practice of law squarely conflict with the Rules of Professional Conduct imposed on attorneys by Tennessee Supreme Court Rule 8. Rule 0780-01-550-.06(1)(b) is at odds, specifically, with an attorney's obligation to keep her client informed about the status the legal matter the attorney has agreed to handle: "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty

to act in the client's best interests, and the client's overall requirements as to the character of representation." RPC 1.4, Comment 5.

For these reasons, Chapter 377 and the Emergency Rules, as applied to attorneys, constitute an impermissible usurpation by the Legislative and Executive Branches of the powers and responsibilities of the Judicial Branch. Chapter 377 and the Emergency Rules are therefore invalid under Article II, Section 2 of the Tennessee Constitution.

5. Granting the Injunction Would Further the Public Interest

A. The public interest is always served by the protection of constitutional liberties.

The public interest always lies with protection of a party's constitutional rights. *See G & V Lounge, Inc. v. Mich. Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher,* 70 F.3d 1474, 1490 (6th Cir. 1995). This is especially the case in the First Amendment context, because restrictions on speech not only implicate the would-be speaker. Such restrictions also impinge on the rights of members of the public "to receive information and ideas." *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943).

Plaintiffs Carol Coppinger, Allison Cavopol and Terrence McDaniel exemplify the impact of the Emergency Rules on the broader public. Ms. Coppinger and Ms. Cavopol want and need to obtain impartial advice, from individuals who have no financial conflict of interest, about what health options would be most suitable for them personally. They and Dr. McDaniel also want to obtain such information for others. In the case of Ms. Coppinger, she needs help on behalf of her son with disabilities, Samuel Shirley. Ms. Cavopol and Dr. McDaniel need information and advice for their employees. Yet, because of the Emergency Rules, the only individuals authorized to provide such advice are insurance producers, who have an inherent

financial interest in selling them or their company insurance. For each of these plaintiffs, there are many thousands of other Tennesseans and businesses that find themselves in the same position. The public's First Amendment rights are impaired no less than those of the plaintiffs.

B. Enjoining Chapter 377 and the Emergency Rules will further the public's interest in broadening health coverage and access to health care.

According to the U.S. Census Bureau, nearly 900,000 Tennesseans lack health insurance. 2012 American Community Survey.[3] The expansion of health insurance coverage in Tennessee is clearly in the public's interest, but that interest is undermined by the Emergency Rules, because they chill the outreach and enrollment efforts necessary to increase the number of Tennessee covered by health insurance.

The importance of outreach and enrollment in increasing the number of people covered by insurance is demonstrated by the experience of Massachusetts. In 2006, major health care reform legislation was enacted in Massachusetts. Mass. Acts of 2006, Ch. 58. In many ways a prototype for the ACA, the Massachusetts law made insurance accessible and affordable by reforming the health insurance market and providing subsidies for coverage. The law also created the "Connector," which, like the ACA's health insurance Marketplaces, is designed to facilitate and simplify access to insurance for individuals, families, and small businesses. *See* Julia Paradise *et al.* "Providing Outreach and Enrollment Assistance: Lessons Learned from Community Health Centers in Massachusetts," Kaiser Family Foundation (Sept. 24, 2013).[4]

Earlier this year, researchers conducted a study of the effects of enrollment assistance in Massachusetts on ensuring access to health coverage. The researcher found that, in

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[3] Data available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_1YR_S2701&prodType=table.

[4] Available at http://kff.org/health-reform/issue-brief/providing-outreach-and-enrollment-assistance-lessons-learned-from-community-health-centers-in-massachusetts/.

Massachusetts, intensive outreach and enrollment efforts were crucial to connecting uninsured individuals with health coverage. From these results, the researchers concluded that

> Broad public education about affordable insurance options and how to enroll is essential to the success of the ACA's expansion of coverage. In addition, for medically underserved populations and communities disadvantaged by poverty and other hardships – who stand to benefit most from coverage – one-on-one assistance is a crucial complement. The intensive support they require, and ongoing rather than occasional needs for assistance, suggest the importance of sustained investment in outreach and enrollment efforts conducted by health centers as well as other organizations.

Id.

As demonstrated by Plaintiffs' affidavits, the Emergency Rules are chilling outreach and enrollment efforts in Tennessee and undermining the important public interest in expanding health insurance coverage.

6. The Court Has Jurisdiction to Grant Immediate Declaratory Relief

The Uniform Administrative Procedures Act, T.C.A. 4-5-225(a) provides that:

> (a) The legal validity or applicability of a statute, rule or order of an agency to specified circumstances may be determined in a suit for a declaratory judgment in the chancery court of Davidson County, unless otherwise specifically provided by statute, if the court finds that the statute, rule or order, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the complainant.

Subsection (c) of the same statute provides that:

> (c) In passing on the legal validity of a rule or order, the court shall declare the rule or order invalid only if it finds that it violates constitutional provisions, exceeds the statutory authority of the agency, was adopted without compliance with the rulemaking procedures provided for in this chapter or otherwise violates state or federal law.

As explained above, the Emergency Rules are invalid on all of the alternative grounds listed in Subsection (c) and must therefore be declared to be void and of no effect.

Subsection (b) provides that a declaratory judgment cannot be rendered concerning the validity or applicability of a statute or rule until the plaintiff has petitioned the agency for a

declaratory order and the agency has refused to issue a declaratory order. That prohibition does not apply in this case, however. The Tennessee Supreme Court has held that T.C.A. § 4-5-225(b) does not prevent the Chancery Court from considering a constitutional challenge to the facial validity of a statute, even when the agency has not considered a declaratory order. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 845 (Tenn. 2008). Because adjudicating facial constitutional challenges is a judicial function, exhaustion of administrative remedies cannot be required in such cases. Because, for the reasons explained above, Chapter 377 and the Emergency Rules are invalid on their face, the Court has jurisdiction to grant declaratory relief at this time, as requested by the plaintiffs.

CONCLUSION

For the foregoing reasons, the Court should enter a temporary restraining order and a temporary injunction prohibiting the Defendants form enforcing Chapter 377, Public Acts of 2013, and DCI Emergency Rules Chapter 0780-01-55 pending further proceedings, and the entry of declaratory and permanent injunctive relief.

DATED: September 30, 2013.

Respectfully Submitted,

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Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have delivered a copy of this Memorandum by email and by hand to Ms. Sarah Hiestand, Office of Attorney General and Reporter, on this 30th day of September, 2013.

Christopher E. Coleman

TENNESSEE GENERAL ASSEMBLY
FISCAL REVIEW COMMITTEE

FISCAL NOTE

SB 1145 - HB 881

February 25, 2013

SUMMARY OF BILL: Grants only licensed insurance producers the authority to: sell, solicit, or negotiate health insurance; make recommendations to purchasers, enrollees, or employers or prospective purchasers or enrollees concerning the substantive benefits, terms, or conditions of health plans; enroll an individual or employee in a qualified health plan offered through an exchange; or act as an intermediary between an employer and an insurer that offers a qualified health plan offered through an exchange. Requires the Commissioner of the Department of Commerce and Insurance (the Department) to adopt appropriate rules and establish training and certification for insurance navigators prior to a health insurance exchange becoming operational. Sets requirements for persons wanting to become insurance navigators. Authorizes the Commissioner to deny, suspend, or revoke the authority of a navigator upon good cause.

ESTIMATED FISCAL IMPACT:

Increase State Revenue - $84,000/FY13-14
$138,000/FY14-15
$78,000/FY15-16 and Every Two Years Thereafter
$72,000/FY16-17 and Every Two Years Thereafter

Increase State Expenditures - $64,800/FY14-15
$61,600/FY15-16 and Subsequent Years

Other Fiscal Impact – The estimated impact, as shown above, assumes the U.S. Department of Health and Human Services (HHS) will finalize guidance on the roles of navigators by July 1, 2013. If HHS does not complete such guidance, it will inhibit the Department of Commerce and Insurance from promulgating rules and regulations necessary to effectuate certification and licensing of navigators.

Assumptions:

- The Department would be required to hold a hearing to establish rule-making. Any necessary rule-making can be handled within the existing resources of the Department.
- The Department would create a new licensing type for health insurance navigators.
- This license will be valid for a period of two years.

Attachment A

- The Department will charge a $60 certification/licensing fee and a $60 renewal fee every two years.
- The Department estimates that there will be a total of 2,500 entities which will become certified/licensed as navigators. The Department estimates that these entities will become certified/licensed over a three-year period.
- By December 2013, approximately 1,200 entities will be licensed. This will result in an increase in state revenue of $72,000 (1,200 x $60) in FY13-14. These entities will renew their licenses by March 2015 resulting in an increase in state revenue of $72,000 in FY14-15 and every two years thereafter.
- By June 2014, an additional 200 entities will become licensed, resulting in an increase in state revenue of $12,000 (200 x $60) in FY13-14. These entities will renew their licenses by March 2016 resulting in an increase in state revenue of $12,000 in FY15-16 and every two years thereafter.
- By December 2014, approximately 1,100 additional entities will become licensed resulting in an increase in state revenue of $66,000 (1,100 x $60) in FY14-15. These entities will renew their licenses by March 2016 resulting in an increase in state revenue of $66,000 in FY15-16 and every two years thereafter.
- The increase in state revenue in FY13-14 is estimated to be $84,000 ($72,000 + $12,000).
- The increase in state revenue in FY14-15 is estimated to be $138,000 ($72,000 + $66,000).
- The increase in state revenue in FY15-16 is estimated to be $78,000 ($12,000 + $66,000). This amount will remain constant every two years thereafter.
- The increase in state revenue in FY16-17 is estimated to be $72,000. This amount will remain constant every two years thereafter.
- According to the Department, it will require one new account tech position in FY14-15 to assist with the certification/licensure program.
- There will be a one-time increase in state expenditures, associated with this position, in the amount of $3,200 (office landscaping: $2,000 + computer/software/etc.: $1,200).
- There will be a recurring increase in state expenditures, associated with this position, in the amount of $61,648 (salary: $31,600 + insurance: $5,999 + benefits: $4,749 + supplies: $600 + network/phone: $2,000 + lease: $1,700 + administrative cost allocation: $15,000).
- According to the Department, it cannot establish such certification and licensing until the U.S. Department of Health and Human Services (HHS) provides final guidance on the role and regulation of navigators. Depending on the final regulations established by the HHS, these estimates may change. The federally facilitated health insurance exchange is set to be operational by October 1, 2013. The HHS is planning to reevaluate essential health benefits determinations for calendar year 2016 based on the experience in 2014 and 2015. This reevaluation could have a significant impact on the exchange through which the navigators will assist consumers in accessing health insurance policies. The fiscal impact this could have on the certification/licensure program is unknown.

CERTIFICATION:

The information contained herein is true and correct to the best of my knowledge.

Lucian D. Geise, Executive Director

/jdb